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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-632

H. MAX MURRAY, et al.,
Petitioners,

v.

LAWRENCE S. WAGLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT

After eight years of employment as a teacher in a public high school, respondent's contract was not renewed. He brought suit in a United States District Court claiming that his employment was terminated because of his publicly-expressed views on certain controversial issues, in violation of his right of free speech under the First and Fourteenth Amendments. After a nine-day trial, at which some thirty witnesses testified, a jury returned a verdict for respondent. The District Judge

set the verdict aside and entered judgment N.O.V. for petitioners, but the Court of Appeals reversed, finding that there was ample evidence from which "the jury could reasonably infer that appellant's termination was motivated by the public expression of his controversial views." (Pet. A-25.) The court summarized the evidence as follows:

> "Appellant was employed by the R. A. Long High School in 1962. During the first five years of his service his competency as a teacher was not challenged seriously enough to inspire any suggestion of nonrenewal of his contract. In the fall of 1965 he was elected chairman of the local chapter of the American Civil Liberties Union. In the spring of 1966 he began to challenge long accepted practices at the high school as violative of the separation of church and state—including holding baccalaureate services at the school and offering prayers at the annual honor society banquet. In October 1967 appellant wrote a letter to the local newspaper expressing his views on the subject. A public controversy ensued which continued into the spring of 1968. Early in the same year, appellant wrote a letter to the local newspaper defending ACLU's position favoring legalization of marihuana. This letter, too, provoked intense public comment, largely critical of appellant. After a year of comparative quiet, it was brought to public attention that appellant had made available to his students a pamphlet titled, 'The Student as Nigger,' which, in unrestrained language, analogized the student-teacher relationship to a system of slavery. There was evidence that criticism of appellant's effectiveness as a teacher began with the church-state controversy, intensified during the marihuana incident, diminished in the lull preceding the distribution of the pamphlet, recommenced following that distribution, and continued until appellant's termination. There is also evidence that in faculty meetings, exchanges between appellant and the school principal and superintendent, and meetings of the board, appellant's expression of controversial views was linked with his possible dismissal. Finally, there was evidence that appellees were aware of the problem of sustaining a dismissal based upon appellant's communications and deliberately undertook to 'build a record' to support dismissal on other grounds." (Pet. A-24-25; footnote omitted).

Subsequent to the original decision of the Court of Appeals, this Court issued its decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). Petitioners then filed a petition for certiorari (No. 76-1447), contending in substance that the decision in this case was inconsistent with *Mt. Healthy*. This Court granted the writ and summarily remanded the case to enable the Court of Appeals to reexamine its decision in light of *Mt. Healthy*. (Pet. A-29.)

On remand, the Court of Appeals reaffirmed its original decision, holding that the District Judge's instructions to the jury were not only consistent with *Mt. Healthy*, *supra*, but in fact required plaintiff to meet an even more stringent burden of proof:

> "*Mt. Healthy* held that a teacher allegedly fired for exercising First Amendment rights has the burden of proving his conduct was constitutionally protected and was a "motivating factor" in the decision not to rehire him. The burden then shifts to the school district and officials to show by a preponderance of the evidence that the teacher would have been fired even in the absence of the protected conduct. *Mt. Healthy City School District* v. *Doyle*, *supra*, 429 U.S. at 287.
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> "In the present case the jury was instructed that appellant contended his contract would have been renewed 'but for' his exercise of constitutionally pro-

tected rights and had the burden of showing that his contract was not renewed 'because of' his exercise of those rights. The jury was further instructed that in order to find against the school officials, as it did, it must find they did not renew appellant's contract 'without having probable cause to believe that plaintiff was ineffective as a teacher.'

"These instructions considered as a whole required appellant to show by a preponderance of the evidence that his contract would have been renewed except for his exercise of constitutionally protected rights. This is a greater burden of proof than that imposed upon the teacher in *Mt. Healthy*." (Pet. A.-31).

Petitioners then filed a second petition for certiorari.

ARGUMENT

Petitioners have contended throughout this case that respondent was terminated, not because of his free speech activities, but because he was an inadequate or ineffective teacher. They repeat this contention in their petition for certiorari. But the jury found that respondent was terminated because of his speech, and the Court of Appeals, after reviewing the record, determined that there was abundant evidence to support that finding. We believe the Court of Appeals was correct, but in any event, this Court does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioners argue that the decision below is somehow inconsistent with *Mt. Healthy*. But as the Court of Appeals pointed out, the issue to be decided under *Mt. Healthy* is a factual, not a legal, one. *Mt. Healthy* held that a public employee allegedly discharged for exercising First Amendment rights has the burden of proving that his protected conduct was a "substantial" or "motivating factor" in the decision to discharge. The em-

ployer then has the burden to show that the employee would have been discharged "even in the absence of the protected conduct." 429 U.S. at 287. Since the present case was tried to a jury, the issue here is whether the instructions to the jury were consistent with *Mt. Healthy*. The Court of Appeals, after reviewing the jury instructions, concluded that they placed an even greater burden on respondent than *Mt. Healthy* required, since they placed on *him* the burden of proving "that his contract would have been renewed except for his exercise of constitutionally protected rights." (Pet. A-31.)

Petitioners disagree with the Court of Appeals' interpretation of the jury instructions. They contend that the instructions permitted the jury to return a verdict for respondent if "it found that the school disapproved of the protected activity, whether or not he was *also* an ineffective teacher, and regardless of independent grounds for non-renewal." (Pet. 8.) In support of this contention, they cite only a small portion of the instruction, taken out of context.[1] The Court of Appeals, after re-

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[1] At pp. 7-8 of the petition, petitioners quote a portion of the jury instructions as follows:

"In order to prove his claim, the burden is upon the plaintiff to establish, by a preponderance of the evidence, the facts that: First: That the non-renewal of plaintiff's teaching contract was because of his exercise of his constitutional rights.

* * * *

"An injury or damage is proximately caused by an act, or failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission." (Petitioners' emphasis.)

Omitted from this excerpt, as indicated by petitioners' asterisks, was the following crucial language:

[continued]

viewing the *entire* instruction, unanimously rejected petitioners' contention. Again, we believe the court was correct, but in any event, this is not the kind of issue which merits the attention of this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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"Second: That the non-renewal of plaintiff's teaching contract was the proximate cause of the injury and consequent damage to plaintiff."

When these words are reinserted where they belong, it becomes clear that the language which petitioners have italicized referred not to the causal relationship between respondent's free speech and the nonrenewal of his contract, but rather to the causal relationship between such nonrenewal and his monetary injury or damage.

The fragment of the instruction quoted by petitioner is only a small part of the portion which bears on the *Mt. Healthy* issue. If the Court desires to read the entire portion which is relevant, it can be found in our brief in opposition to the earlier petition for certiorari, No. 76-1447, at pp. 4-5.